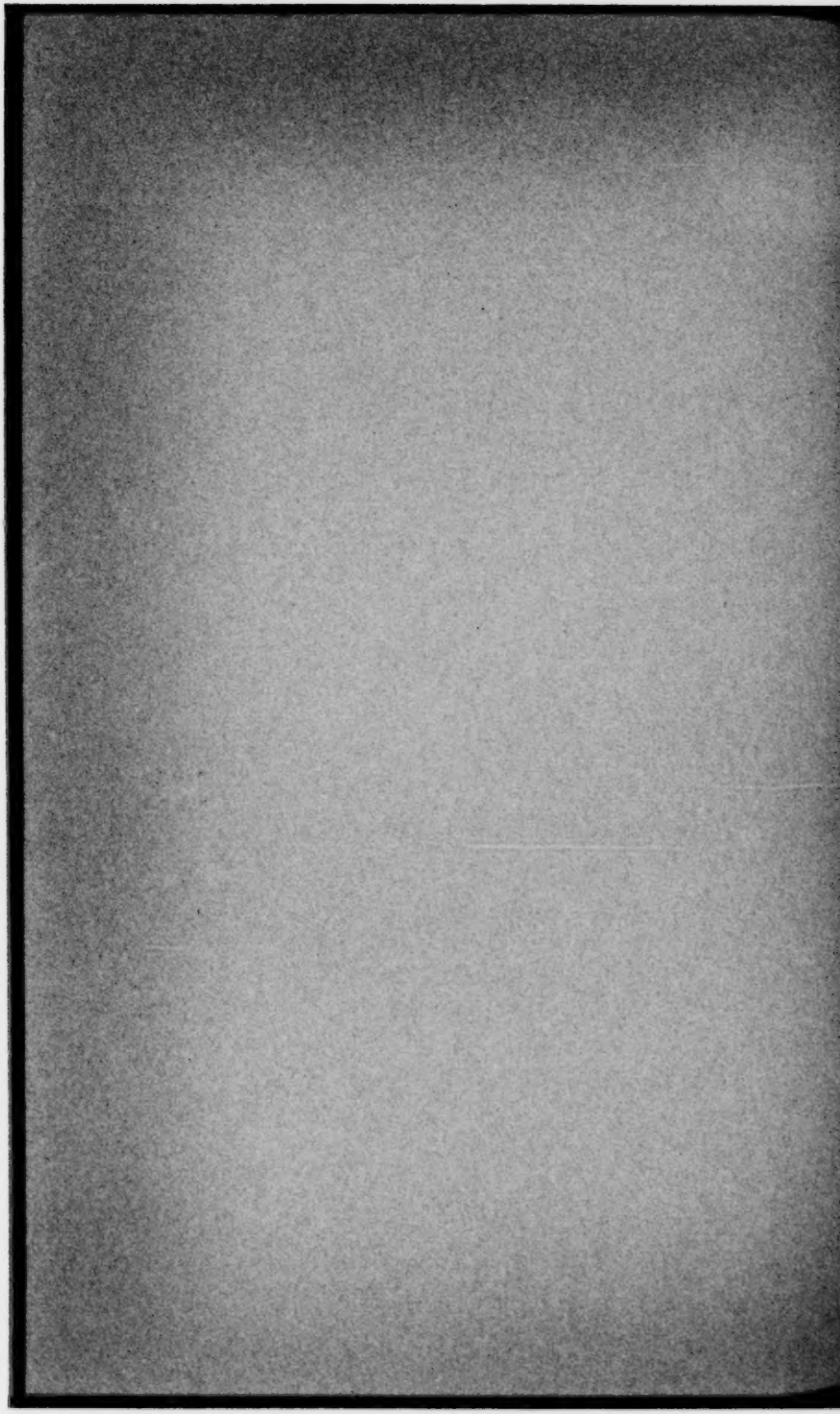

## APPENDIX.

Filed May 10, 1940.

United States Circuit Court of Appeals for the Ninth Circuit.

P. M. Jackson, Trustee in Bankruptcy for the Estate of Leonard J. Woodruff, a bankrupt, Appellant, v. E. A. Lynch, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, Alleged Bankrupt, Appellee. No. 9401.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: WILBUR, DENMAN and MATHEWS, Circuit Judges.

WILBUR, Circuit Judge:

On July 5, 1939, Leonard J. Woodruff filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of Oklahoma predicating jurisdiction upon the proposition that his principal place of business during the preceding six months was in that district. The order of adjudication was made on the same day and P. M. Jackson, the appellant, was selected as trustee in bankruptcy in such proceeding.

On July 13, 1939, an involuntary petition in bankruptcy was filed against Leonard J. Woodruff in the United States District Court for the Southern District of California praying that he be adjudged a bankrupt and seeking the appointment of a receiver to conserve the assets of the bankrupt within the district. The court appointed E. A. Lynch, the appellee, as receiver in bankruptcy. Jurisdiction was predicated upon the ground that the alleged bankrupt had his domicile within said district for more than six

months prior to filing petition and that for more than ten years his principal place of business had been located in said district. The petition was by a single creditor whose claim was for $278,631.71, evidenced by a judgment for that amount. It did not purport to be a petition for ancillary administration, although at the time of filing it the creditor knew that the alleged bankrupt had previously been adjudicated a bankrupt by the District Court for the Eastern District of Oklahoma and so informed the judge who appointed the receiver.

As it is not questioned that the receivership was necessary to conserve and protect the assets of the bankrupt within the Southern District of California, it is unnecessary to elaborate the subject further than to say that it involves, among other things, the possession and control of a large stock of merchandise.

In view of the dependency of these proceedings in Oklahoma and in California the trustee in bankruptcy appointed by the District Court for the Eastern District of Oklahoma, purporting to act under order No. 6 of general orders in bankruptcy promulgated January 16, 1939, effective February 13, 1939, invoked the authority of the Oklahoma court to determine whether or not it should make an order directing that all further proceedings be had before it and transferring to that court the bankruptcy proceedings pending before the United States District Court for the Southern District of California. The order applied for was made. A copy of this order was filed with the Clerk of the District Court for the Southern District of California and was brought to the attention of the court by the clerk. The court, by order, declined to make the order transmitting the record and proceedings

until it had settled the accounts of the receiver and allowed compensation to him and his attorney. It further ordered that within five days the receiver and his attorneys file their report and petition for compensation. The trustee in bankruptcy appointed in the proceedings in the Eastern District of Oklahoma moved the court to revoke this order but it refused to do so and confirmed the previous *ex parte* order. From this order denying the trustee's motion this appeal was taken. In the meantime an appeal to the Circuit Court of Appeals for the Tenth Circuit had been taken from the order of the District Court of Oklahoma assuming jurisdiction over the Cailfornia proceedings under the provisions of General Order in Bankruptcy No. 6.

It appears from statements made at the argument that the receiver has filed his accounts as required by the order and that the court has ordered the receiver to deliver the property in his possession to the appellant not to be removed from the district until the account is settled and fees paid and that the trustee has agreed to the order subject to the determination of this appeal as to the jurisdiction of the court. The questions presented are therefore not entirely moot.

The appellant now contends that General Order in Bankruptcy No. 6, and the corresponding statute (11 U. S. C. A., Section 55; Sec. 1, 52 Stat. 851) do not apply to the situation. He contends that upon the adjudication of bankruptcy in the District Court for the Eastern District of Oklahoma it immediately acquired exclusive jurisdiction over the bankruptcy proceedings and that the title to and right to possession of all the property of the bankrupt wherever located vested in him and that no district court of the United States in any other district had juris-

diction to entertain or consider a primary application for an adjudication of bankruptcy filed thereafter. If this were true it would follow that the District Court for the Southern District of California could make no valid order in the premises.

We do not agree with appellant's understanding of the law but think that the District Court for the Southern District of California does have jurisdiction by virtue of the primary petition addressed to it. Under the provisions of the Bankruptcy Act it may and frequently does happen that two or more courts have concurrent jurisdiction over bankruptcy proceedings against the same person. This act (52 Stat. 857, Sec. 1; 11 U. S. C. A., Section 55) provides that when petitions are filed in "different courts of bankruptcy, each of which has jurisdiction", the case shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated in the court which can proceed with the same for the greater convenience of the parties in interest. The word "jurisdiction" is not always used in the same sense, as this section shows. The phrase "first acquiring jurisdiction" as used therein has been held to refer to the court in which a petition is first filed. *In re* Elmira Steel Co., 109 F. 456. But clearly, as the word is used in the phrase "courts, each of which has jurisdiction", it has a broader meaning and refers to the jurisdiction conferred by the act upon bankruptcy courts in general, without reference to the order of filing a petition or to priority of adjudication. In that sense jurisdiction was conferred upon the District Court for the Southern District of California as well as upon the court in the Eastern District of Oklahoma. Acting thereunder each could exercise such power as might be necessary to

carry out the purpose of the act. (See, Babbitt v. Dutcher 216 U. S. 102.)

Until consolidation was ordered by the District Court for the Eastern District of Oklahoma, both of these courts had primary jurisdiction to entertain petitions in bankruptcy, appoint receivers, and do whatever was necessary to preserve the bankrupt's property. In the exercise of that jurisdiction the District Court for the Southern District of California appointed appellee as receiver, and his duties did not automatically cease upon the decision of the District Court for the Eastern District of Oklahoma to hear both cases. The Supreme Court has gone so far as to hold that where a territorial court, with no jurisdiction in bankruptcy, had appointed a receiver of certain property which had been attached and was in danger of destruction, and subsequently authorized its sale, that sale was valid, although the owner of the property had been adjudicated a bankrupt, without the knowledge of the territorial court, nearly three months before the sale. (Jones v. Springer, 226 U. S. 148.) If a court with no jurisdiction in bankruptcy could properly do all that was done by such court in that case it is obvious that the District Court for the Southern District of California had power to do all that it did in this case when acting upon a petition in bankruptcy, notwithstanding a prior adjudication.

Assuming that, as has been shown, the District Court for the Southern District of California had jurisdiction to appoint the receiver and administer the estate until the District Court for the Eastern District of Oklahoma made its order determining the question of convenience and directing the transfer of the records in pursuance of Gen-

eral Order in Bankruptcy No. 6, the question is whether or not the trial court wrongfully retained jurisdiction over the accounts of the receiver until they should be settled and his compensation and that of his attorney finally determined.

If the question involved merely the settling of the receiver's accounts and fixing his fees and those of his attorney, we see no persuasive reason why that matter might not have been transferred to the District Court for the Eastern District of Oklahoma. Such a transfer would be analogous to that which occurs when the affairs of a bankrupt, previously in charge of an equity receiver appointed by a state or federal court, are taken over by a bankruptcy court in the exercise of its exclusive jurisdiction. That such a court may provide for compensating those who have taken care of the bankrupt's estate under the order of a court of competent jurisdiction is clear. (Gross v. Irving Trust Co., 289 U. S. 342; Moore v. Scott, 55 F. 2d 863.) But the situation here is complicated by the fact that the District Court for the Southern District of California, acting in pursuance of its power as a federal court of bankruptcy, has taken possession of the property within its district which might have been lost or destroyed but for such action and might yet be lost or destroyed if left for a single day without a legal custodian.

Although the order of adjudication of the bankruptcy of Woodruff and the appointment of the trustee vested in the latter the title and right of possession of the property of the bankrupt wherever situated (Isaac v. Hobbs Tie & T. Co., 282 U. S. 734) the process of the District Court for the Eastern District of Oklahoma, acting under this

section, could have no extraterritorial effect. (Babbitt v. Dutcher, *supra; In re* J. & M. Schwartz, 204 F. 326; Oronoco Iron Co. v. Metzel, 230 F. 40.)

It follows that in order to secure control of the property of the bankrupt which was in the hands of the receiver appointed by the District Court for the Southern District of California it was necessary for the trustee to obtain an order from that court directing its receiver to surrender the property to the trustee. As we construe the statute, such an order would be an exercise of ancillary jurisdiction in bankruptcy (11 U. S. C. A., Section 11, sub. 20; Section 2-A, sub. 20, Chandler Act). In exercising that ancillary jurisdiction we think it was proper for the court below to provide for payment to those who had cared for the bankrupt's property under its direction before ordering its surrender to the trustee. (See 11 U. S. C. A., Section 11, sub. (20).)[1]

It follows that the court below was right in retaining control of the bankrupt's property until the receiver's accounts were settled and provision made for his fees and those of his attorneys as an incident to the turnover of the property. The temporary retention of the papers was merely incidental to that order and it appears that the papers were shortly thereafter transmitted.

Order affirmed.

Filed May 10, 1940.

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[1]Note 1: 11 U. S. C. A., section 11, sub. (20), is as follows:

"(20) exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of Leonard J. Woodruff, Bankrupt.

P. M. Jackson, trustee in bankruptcy, Appellant, vs. E. A. Lynch, receiver in bankruptcy, Rupert B. Turnbull and Leonard J. Meyberg, Appellees. No. 9612.

May 1, 1941.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before DENMAN, MATHEWS and HEALY, Circuit Judges:

MATHEWS, Circuit Judge:

This appeal is from an order approving the accounts of a receiver in bankruptcy, allowing reimbursement of certain expenses incurred by the receiver, and allowing compensation to the receiver and his attorneys.

On July 5, 1939, Leonard J. Woodruff filed a voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Oklahoma (hereafter called the Oklahoma court) and, on the same day, was by that court adjudged a voluntary bankrupt.

On July 13, 1939, M. E. Heiser filed in the District Court of the United States for the Southern District of California (hereafter called the California court) an involuntary petition against Woodruff and, with it, a petition for the appointment of a receiver to take charge of Woodruff's property and to conduct his business; and, on the same day, the California Court appointed E. A. Lynch as such receiver.

On July 20, 1939, the Oklahoma court caused a meeting of Woodruff's creditors to be held, at which meeting appellant, P. M. Jackson, was appointed as trustee in bankruptcy.

On July 27, 1939, upon an order granted by the California court upon the verified petition of the receiver, Leonard J. Meyberg and Rupert B. Turnbull were appointed as attorneys for the receiver.

On October 16, 1939, pursuant to Sec. 32 of the Bankruptcy Act, 11 U. S. C. A., Sec. 55, and Order 6 of the General Orders in Bankruptcy, 11 U. S. C. A., following Sec. 53, the Oklahoma court, having determined that it was the court in which the cases could proceed with the greatest convenience to the parties in interest, ordered that the California case be transferred to the Oklahoma court.[1]

A certified copy of the Oklahoma court's order of October 16, 1939, was filed in the California court on October 18, 1939. On October 19, 1939, the California court ordered that the receiver file his account and petition for compensation and for reimbursement of expenses, that his attorneys file their petition for compensation, and that the clerk of the California court "stay the transmittal of the records" in the California case to the Oklahoma court until the account should be settled and the petitions heard and determined.

Appellant filed a motion to vacate the order of October 19, 1939. The motion was denied on November 15, 1939. On November 17, 1939, appellant appealed from

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[1]The order was affirmed in Heiser v. Woodruff, 10 Cir., 112 F. 2d 652.

the order of October 19, 1939, and from the order of November 15, 1939—the order denying his motion.[2]

The orders were affirmed[3] on May 10, 1940. Jackson v. Lynch, 9 Cir., 111 F. 2d 1003. Rehearing was denied on June 21, 1940. Certiorari was denied on October 14, 1940, 311 U. S. ..... Our mandate was issued on October 21, 1940, and was filed in the California court on October 28, 1940.

The receiver's account and petition for compensation and for reimbursement of expenses and his attorneys' petition for compensation were filed on October 24, 1939. Appellant filed objections to the account and petitions on November 17, 1939. The receiver filed a supplemental account and petition on May 13, 1940. His attorneys filed a supplemental petition on May 20, 1940. A hearing was had on June 20, 1940. Thereafter, on June 27, 1940, the California court entered an order approving the accounts, allowing reimbursement of certain expenses incurred by the receiver, and allowing compensation to the receiver in the sum of $2,000 and to his attorneys in the sum of $7,500. This appeal followed.

Appellant contends that the California court had no jurisdiction to make the order of June 27, 1940, because, at that time, our mandate in Jackson v. Lynch, *supra*—decided May 10, 1940—had not been issued. There is no merit in this contention. The orders reviewed in Jackson v. Lynch, *supra*, were not final judgments or de-

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[2]The opinion in Jackson v. Lynch, 9 Cir., 111 F. 2d 1003, 1004, speaks of this as an appeal from the order of November 15, 1939. Actually, it was also an appeal from the order of October 19, 1939.

[3]The opinion concludes with the words "Order affirmed." The word "Order" should read "Orders."

crees, but were interlocutory orders only. Consequently, the appeal therefrom did not remove the entire case to this court or preclude further proceedings in the court below. Foote v. Parsons Non-Skid Co., 6 Cir., 196 F. 951, 953. See, also, *In re* F. P. Newport Corp., 9 Cir., 98 F. 2d 453, 456. Much less were such proceedings precluded by a mere stay of mandate.

Except on the jurisdictional ground above mentioned, appellant does not challenge that part of the order which allows reimbursement of expenses incurred by the receiver. As the ground mentioned is untenable, that part of the order is assumed to be correct.

Appellant contends that the allowance of $2,000 as compensation to the receiver was in excess of that which the Bankruptcy Act prescribes. By Sec. 2 of the Act, 11 U. S. C. A., Sec. 11, courts of bankruptcy are empowered to—

> "(3) Appoint, upon the application of parties in interest, receivers . . . to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified . . ."
>
> "(5) Authorize the business of bankrupts to be conducted for limited periods by receivers . . . if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 48 of this Act (11 U. S. C. A., Sec. 76.)"

Section 48 of the Act, 11 U. S. C. A., Sec. 76, provides:

> "a. RECEIVERS. The compensation of receivers appointed under this act, for their services payable after they are rendered, shall be as follows:

"(1) As Custodians. Receivers appointed pursuant to clause (3) of section 2 of this Act (11 U. S. C. A., Sec. 11) who serve as mere custodians shall receive such amount as may be allowed by the court, but in no event to exceed 2 per centum on the first $1,000 or less, and one-half of 1 per centum on all above $1,000 on moneys disbursed by them or turned over by them to any persons, including lienholders, and also upon moneys turned over by them to the trustee and on moneys subsequently realized from property turned over by them in kind to the trustee.

"(2) With Full Powers. Receivers appointed pursuant to clause (3) of section 2 of this Act (11 U. S. C. A., Sec. 11) who serve otherwise than as mere custodians shall receive compensation by way of commissions upon the moneys disbursed or turned over to any persons, including lienholders, by them and also upon the moneys turned over by them or afterward realized by the trustees from property turned over in kind by them to the trustees, such amount as the court may allow, but in no event to exceed 6 per centum on the first $500 or less, 4 per centum on all in excess of $500 but not more than $1,500, 2 per centum on all above $1,500 and not more than $10,000, and 1 per centum on all above $10,000.

"(3) Conducting Business. Receivers appointed pursuant to clause (3) of section 2 of this Act (11 U. S. C. A., Sec. 11) who conduct the business of the bankrupt as provided in clause (5) of section 2 of this Act (11 U. S. C. A., Sec. 11) shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (2) of this subdivision a."

In the case at bar, the court disregarded Sec. 48 of the Act (11 U. S. C. A., Sec. 76), and made an unconditional allowance of $2,000. This was error. The receiver served from July 13, 1939, the date of his appointment, until October 18, 1939, when the Oklahoma court's order of October 16, 1939, was filed in the California court—a period of three months and five days. His services were chiefly those of a custodian. Other services performed by him were clearly unnecessary and of no value to the estate.

The receiver, during his brief period of service, conducted a small and highly unprofitable business which theretofore had been conducted by the bankrupt. The court's order authorized the recevier "to conduct the business and sell the same as a going concern, if it can be done with benefit to the estate." The receiver testified that he "figured right from the start that the business was a hobby and not a business;" that he knew at the start "it couldn't be operated at a profit." Yet, instead of reporting at once to the court that the business could not be conducted "with benefit to the estate," but could only be conducted at a loss, he did so conduct it for several months.

We conclude that the only services for which the receiver is entitled to be compensated are those which he performed as a custodian, and that his compensation, therefore, should not exceed the maximum allowance permitted by paragraph (1), subdivision a, of Sec. 48 of the Bankruptcy Act (11 U. S. C. A., Sec. 76).

Appellant contends that the allowance of compensation to the receiver's attorneys was improper because their appointment was procured in violation of Order 44 of the

General Orders in Bankruptcy, 11 U. S. C. A., following Sec. 53. Order 44 provides:

> "No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interest of the estate, the court may authorize his employment and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both. . . ."

In this case, the receiver's attorneys (Turnbull and Meyberg) were appointed upon a verified petition of the receiver which, though not signed by Turnbull and Meyberg, was prepared by them. At that time and at all times here pertinent, Turnbull and Meyberg were attor-

neys for Heiser, the petitioning creditor, whose claim against the estate, amounting to $278,631.71, was disputed by appellant as trustee. Thus, at the time of procuring their appointment as attorneys for the receiver, Turnbull and Meyberg represented an interest adverse to the trustee and the estate in the matter upon which they were to be engaged. This fact was well known to the receiver, but was not disclosed in his petition.

Attached to and filed with the receiver's petition were the affidavits of Turnbull and Meyberg, each stating that he was "not employed by or connected with the bankrupt or any other person having an interest adverse to the receiver, trustee or creditor." The affidavits were untrue; for, at the time they were made and at all pertinent times, Turnbull and Meyberg were employed by Heiser, whose interest was adverse to the trustee and to all creditors other than himself.

The court below found that the receiver disclosed to the court that Turnbull and Meyberg were attorneys for Heiser, but the finding does not state when or how the disclosure was made. The evidence does not show that it was made at all.[4] It certainly was not made at the time or in the manner required by General Order 44.

The receiver's petition—written, filed and presented to the court by Turnbull and Meyberg—did not in terms state that it was necessary for the receiver to employ attorneys. It did, however, state that the receiver "must have legal advice concerning his conduct." This and

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[4]It should here be noted that the judge who made the finding was not the judge who made the order authorizing the appointment of Turnbull and Meyberg as attorneys for the receiver. The order was made by Judge James, the finding by Judge Cosgrave.

other statements in the petition obviously were designed and intended to make it appear that it was necessary for the receiver to employ attorneys. There was, in fact, no such necessity, nor does it appear that Turnbull or Meyberg or the receiver had any reason to believe there was any such necessity.

We conclude that the appointment of Turnbull and Meyberg as attorneys for the receiver was procured in violation of General Order 44, and that they are, therefore, not entitled to compensation. Assuming, without deciding, that, in some circumstances, a bankruptcy court may, in the exercise of its discretion, allow compensation, to attorneys whose appointment was procured in violation of General Order 44, we hold that, in the circumstances here shown, to allow such compensation was an abuse of discretion.

The final paragraph of the order under review provides, in substance, that the property of the estate now in the Southern District of California shall not be removed therefrom until the receiver's expenses and the compensation of the receiver and his attorneys have been paid; that said expenses and compensation shall be a first lien on said property and shall be paid on November 1, 1940; and that, if said expenses and compensation are not so paid, the United States Marshal for the Southern District of California shall advertise and sell sufficient of said property to pay the same, unless appellant, as trustee, shall "proceed with such sale" within 10 days after demand made upon him by the receiver.

This part of the order is clearly improper. The property referred to is in the hands of the Oklahoma court's trustee and, therefore, in the custody of the Oklahoma

court. It is not in the custody or subject to the control of the California court. The expenses and compensation allowed by the order (as hereinafter modified) are payable by the trustee in due course of administration, and not otherwise.

The order is modified by inserting therein a provision to the effect that, instead of the sum heretofore allowed, the receiver's compensation shall be the maximum allowance permitted by paragraph (1), subdivision a, of Sec. 48 of the Bankruptcy Act (11 U. S. C. A., Sec. 76), and nothing more; by striking from the order the provision relating to compensation of the receiver's attorneys and inserting in lieu thereof a provision to the effect that said attorneys' petition for compensation are denied; and by striking from the order the final paragraph thereof.

As thus modified, the order is affirmed.

DENMAN, Circuit Judge, concurring:

I am in accord with the prevailing opinion. The affidavits of each attorney that he was not employed by any person having an interest adverse to the trustee undoubtedly persuaded the district judge, now deceased, to authorize their employment by the receiver. They were then the attorneys for the largest creditor of the bankrupt estate, but their appearance in that capacity on other documents in the cause, contradicting their affidavits, could not have been called to that judge's attention.

While it is true that in some cases an attorney for a creditor may have knowldege of the assets of a bankrupt's estate, say, of its pending litigation or of claims to be pressed or defended, which may warrant his appointment to aid a receiver, the record shows no such situation

here. On the contrary, it shows these attorneys built up particulars of a claim for services to the receiver for which they persuaded the successor judge to award them $7,500.00, a considerable part of the claim being an unnecessary and unsuccessful search to discover litigation which might affect the estate. In my opinion if they had not disentitled themselves to any claim at all for a fee, it would have been justified for but a small fraction of that amount.

The $7,500.00 fee payment would have diminished the bankrupt's estate to that extent, to the reduction of the dividend of the claiming attorneys' other client, the estate's principal creditor. An attorney for a receiver, but who also represents the principal creditor, has a persuasive position in pressing for large attorney's fees which would diminish the assets of his creditor and of all the other creditors who are looking to the trustee for their protection. Here there is no consent by the principal creditor personally or by counsel other than the claiming creditors, yet the claim for fees appears to be urged by his attorney.

The record dos not show that the successor judge had a full realization of all the factors here considered, but if it did so show, it is my opinion the fees should have been denied.

HEALY, Circuit Judge, concurring in part and dissenting in part.

I agree that the expenses and compensation properly allowable should be paid only in due course of administration. I agree also with the court's interpretation of the statutes relating to the measure of the compensation

of receivers, but think the receiver's compensation in this instance should be computed under subdivision (a) (2) of section 48, 11 U. S. C. A., Sec. 76 (a) (2).

On the matter of the entire disallowance of compensation for the attorneys I am not able to go along with my associates. If counsel had undertaken to represent interests substantially adverse and had failed to disclose that fact to the court, their claim for fees ought to be disallowed; but such is not the case here. The lawyers represented a creditor, Heiser, whose claim against the bankrupt had been reduced to judgment prior to bankruptcy. While the bankrupt and the Oklahoma trustee were entitled to contend, and did contend unsuccessfully, that Heiser's judgment should be set aside, the receiver appointed merely to conserve assets had no duty in that respect and was not empowered by the court to pass on the validity of claims. In representing both the creditor and the receiver the attorneys did not, I think, act for substantially conflicting interests. Indeed the fact that they already had some knowledge of the bankrupt's property and affairs might well be thought to make them the logical choice as attorneys for a receiver whose business it was to forestall removal or other disposition by the bankrupt of his local assets.

It seems to me hardly just to question the statement of the trial court that the facts were disclosed to it; and I believe it to be wholly unfair to the attorneys to assume that there was any concealment on their part or any real failure to disclose their connection with Heiser. The record is replete with evidence of the disclosure. It was on the petition of Heiser that the involuntary adjudication was made by the trial court, and the attorneys Mey-

berg and Turnbull signed the petition as attorneys for Heiser. Likewise it was this creditor who petitioned for the appointment of the receiver, and his petition is signed by these attorneys as counsel for Heiser. The order of the court appointing the receiver recites that it was made "upon motion of Rupert B. Turnbull, attorney for said petitioner." Indeed, from first to last the record discloses on its face that these attorneys were counsel for Heiser, and the court could not but have been aware of that fact.

Order 44 of the General Orders in Bankruptcy does not require the denial of fees to an attorney where the true facts are not disclosed in the petition for his appointment. It merely permits such denial. The spirit of the rule should be strictly enforced, but there is no justification for a purely mechanical application of it. Here although the disclosure was not made in the precise manner required by the rule, there was an actual and complete disclosure of the facts. Ordinarily, it would be only in the petition itself that opportunity would be given to make the disclosure, but here the situation was different.

Where the trial court has authorized its receiver to employ counsel, I think an appellate court would rarely be justified in rejecting entirely the allowance of compensation because of its belief, after the fact, that an attorney was not necessary. I do not believe there is justification for that course here.

(Endorsed): Opinions. Filed May 1, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of Leonard J. Woodruff, Bankrupt.

P. M. Jackson, Trustee in Bankruptcy, Appellant, vs. E. A. Lynch, Receiver in Bankruptcy, Rupert B. Turnbull and Leonard J. Meyerberg, Appellees. No. 9612.

It is hereby ordered that the opinion heretofore filed in this case be amended:

1. By striking therefrom the sentence beginning with the words "The affidavits" and ending with the word "himself" on page 6 of the printed opinion, and inserting in lieu thereof the following sentence: "The fact that Turnbull and Meyberg were attorneys for Heiser was not disclosed."

2. By striking therefrom the sentence beginning with the word "There" and ending with the word "necessity", on page 7 of the printed opinion, and inserting in lieu thereof the following sentence: "The record discloses no such necessity."

It is further ordered that the petition for rehearing be and it is hereby denied.

WM. DENMAN,
*United States Circuit Judge;*
CLIFTON MATHEWS,
*United States Circuit Judge;*
WILLIAM HEALY,
*United States Circuit Judge.*

The concurring opinion of DENMAN, *C. J.*, is ordered withdrawn.

WILLIAM DENMAN, *C. J.*

(Endorsed): Filed June 30, 1941. Paul P. O'Brien, Clerk.

Office - Supreme Court, U.
FILED
AUG 23 1941
CHARLES ELMORE CROPL
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 316

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, Alleged Bankrupt,

*Petitioner,*

*vs.*

P. M. JACKSON, Trustee for the Estate of Leonard J. Woodruff, a Bankrupt,

*Respondent.*

## ANSWER OF P. M. JACKSON, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 361.

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, Alleged Bankrupt,

*Petitioner,*

*vs.*

P. M. JACKSON, Trustee for the Estate of Leonard J. Woodruff, a Bankrupt,

*Respondent.*

## ANSWER OF P. M. JACKSON, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

P. M. Jackson, trustee in bankruptcy for the estate of Leonard J. Woodruff, a bankrupt, hereinafter referred to as respondent, does not agree with petitioner's statement of the questions involved, or the statement of facts, submitted in support of the petition, and submits that the record and facts are:

## Statement of Facts.

Quoting from the decision of Justice Mathews under attack in the above entitled matter, the record facts are as stated by the justice, as follows:

> "This appeal is from an order approving the accounts of a receiver in bankruptcy, allowing reimbursement of certain expenses incurred by the receiver, and allowing compensation to the receiver and his attorneys.
>
> On July 5, 1939, Leonard J. Woodruff filed a voluntary petition in bankruptcy in the District Court of the United States for the Eastern District of Oklahoma (hereafter called the Oklahoma court) and, on the same day, was by that court adjudged a voluntary bankrupt.
>
> On July 13, 1939, M. E. Heiser filed in the District Court of the United States for the Southern District of California (hereafter called the California court) an involuntary petition against Woodruff and, with it, a petition for the appointment of a receiver to take charge of Woodruff's property and to conduct his business; and, on the same day, the California court appointed E. A. Lynch as such receiver.
>
> On July 20, 1939, the Oklahoma court caused a meeting of Woodruff's creditors to be held, at which meeting appellant, P. M. Jackson, was appointed as trustee in bankruptcy.
>
> On July 27, 1939, upon an order granted by the California court upon the verified petition of the receiver, Leonard J. Meyberg and Rupert B. Turnbull were appointed as attorneys for the receiver.
>
> On October 16, 1939, pursuant to Sec. 32 of the Bankruptcy Act, 11 U. S. C. A., Sec. 55, and Order

6 of the General Orders in Bankruptcy, 11 U. S. C. A. following Sec. 53, the Oklahoma Court, having determined that it was the court in which the cases could proceed with the greatest convenience to the parties in interest, ordered that the California case be transferred to the Oklahoma court. (The order was affirmed in Heiser v. Woodruff, 10 Cir., 112 F. (2d) 652.)

A certified copy of the Oklahoma court's order of October 16, 1939, was filed in the California court on October 18, 1939. On October 19, 1939, the California court ordered that the receiver file his account and petition for compensation and for reimbursement of expenses, that his attorneys file their petition for compensation, and that the clerk of the California court 'stay the transmittal of the records' in the California case to the Oklahoma court until the account should be settled and the petitions heard and determined.

Appellant filed a motion to vacate the order of October 19, 1939. The motion was denied on November 15, 1939. On November 17, 1939, appellant appealed from the order of October 19, 1939, and from the order of November 15, 1939—the order denying his motion. (The opinion in Jackson v. Lynch, 9 Cir., 111 Fed. (2d) 1003, 1004, speaks of this as an appeal from the order of November 15, 1939. Actually, it was also an appeal from the order of October 19, 1939.) The orders were affirmed. (the opinion concludes with the words 'Order affirmed.' The word 'Order' should read 'Orders') on May 10, 1940. Jackson v. Lynch, 9 Cir., 111 F. (2d) 1003. Rehearing was denied on June 21, 1940. Certiorari was denied on October 14, 1940, 311 U. S. 674. Our mandate was issued on October 21,

1940, and was filed in the California court on October 28, 1940.

The receiver's account and petition for compensation and for reimbursement of expenses and his attorneys' petition for compensation were filed on October 24, 1939. The appellant filed objections to the account and petitions on Nov. 17, 1939. Thereafter, on June 27, 1940, the California court entered an order approving the accounts, allowing reimbursement of certain expenses incurred by the receiver, and allowing compensation to the receiver in the sum of $2,000 and to his attorneys in the sum of $7,500. This appeal followed."

The facts are further tersely stated in *Heiser v. Woodruff* (10th Cir.), 112 F. (2d) 652, above referred to in the opinion by the Ninth Circuit Court, as follows:

"On July 5, 1939, L. J. Woodruff filed his petition for voluntary bankruptcy in the United States District Court for the Eastern District of Oklahoma. On the same day he was adjudged a bankrupt and an order of reference was made, referring the matter to George F. Clark, one of the referees in bankruptcy of the court, to take such further proceedings as were required under the law. July 13, 1939, an involuntary petition in bankruptcy was filed by M. E. Heiser against Leonard J. Woodruff in the United States District Court for the Southern District of California. July 20, 1939, the first meeting of creditors was held at Ardmore, Oklahoma, and a trustee was appointed and qualified. *July 22, 1939, M. E. Heiser filed a motion to dismiss the bankruptcy proceedings in the United States District Court for the Eastern District of Oklahoma* on the ground that the bankrupt was a resident of California and the Oklahoma court was therefore without jurisdiction." (Emphasis ours.)

On July 27th, 1939, E. A. Lynch petitioned for an order allowing him to employ as his counsel attorneys Meyberg and Turnbull. [Tr. p. 16.] The petition did not purport to comply with the General Orders in Bankruptcy (11 U. S. C. A., Sec. 53, General Order 44) in that it did not state:

> "to the best of petitioner's knowledge all of the attorneys' connection with the bankrupt or debtor, the creditors or any other parties in interest, and their respective attorneys."

There was attached to the petition an affidavit by Turnbull and Meyberg, each in identical language [Tr. p. 19 and p. 20] containing the following recital:

> "that he is not employed by or connected with the bankrupt or any other person having an interest adverse to the receiver, trustee or creditors."

As is shown by the opinion of the Tenth Circuit, 112 Fed. 2d Series 652, five days before the making of this affidavit, M. E. Heiser filed a motion to dismiss the proceedings in the Eastern District of Oklahoma, and his attorneys of record in said case are Leonard J. Meyberg, Rupert B. Turnbull and T. J. Gibson. Mr. Jackson had been appointed trustee on July 20th, 1939, and if Mr. Heiser had been successful in said proceeding, Jackson would have been removed from office. Not only was Heiser's interest adverse to the trustee, but a direct attack was being made upon the trustee's office and the jurisdiction of the court wherein he was acting.

Heiser's claim was the result of a default judgment in the sum of $278,000 which his attorneys and all parties knew would be challenged as a provable claim in the bankruptcy proceeding. [Tr. p. 204.] The trustee was unsuccessful in a motion under 60 B of Federal Rules of Civil Procedure in having said default set aside (see *Jackson v. Heiser,* 9 Cir., 111 Fed. 2nd Series 310), wherein Leonard J. Meyberg was one of the attorneys of record in opposing the trustee's motion to set aside said default judgment. A charge was included in the petition for attorneys' fees for the time spent in preparing and opposing said motion. [See Tr. p. 63 and p. 64.]

The receiver's petition for an order permitting him to employ counsel was submitted to Judge Wm. P. James, who died before the trial in the District Court. The order authorizing the employment was signed by Judge James. [Tr. p. 21.] Later hearings were had before other judges and orders made by the other judges mentioned in the present petition. The record is bare of any evidence that Judge James knew of the relationship between Heiser and the other creditors or counsel's adverse interest in this respect.

The trustee filed written objections to the petitions of Lynch as receiver and to the petition of the attorneys. [See Tr. p. 103.]

The trial judge ignored the requirements of Section 48 of the Bankruptcy Act (11 U. S. C. A., Sec. 76), and made an arbitrary award to Lynch, and an allowance to

the attorneys. A reading of the three opinions of the justices of the Circuit Court indicates that all agreed that the allowances were excessive, even though Justice Healy did not agree that compensation should be entirely denied by reason of the attorneys' representing an adverse interest and their order of employment being obtained in violation of General Order 44.

The three justices of the Circuit Court wrote separate opinions on which a decree was entered May 31, 1941. [Tr. p. 317.] A petition for rehearing was filed and the three justices signed an order denying the petition, after certain minor modifications were made in Justice Mathews' opinion, leaving the decree of May 1, 1941, as the final decree by the Circuit Court. At the direction of Justice Denman his concurring opinion was withdrawn from the record, leaving Justice Mathews' decision as the written opinion of the court and decree and order denying rehearing a decision by the majority of all of the justices.

There is nothing in the record to support counsels' statement of facts as to the value of the Woodruff estate, or the amount of obligations, or that Woodruff did not schedule assets in California of a value of $140,000 or anything to justify the false and unwarranted statement in respect to a loan to Gavin Craig.

## Argument and Authorities in Answer to Petitioner's Points and Authorities.

### Reply to Petitioner's Point 1.

Petitioner's first point relates to the withdrawal of Justice Denman's concurring opinion.

After the three justices agreed on amendments to the opinion of Justice Mathews, the brief written opinion of Justice Denman was ordered withdrawn. We submit that this did not affect the decree for the following reasons:

1. It is clear Justice Denman then agreed with the opinion of Justice Mathews as amended, as he signed the order amending the opinion, and denying the rehearing.

2. The decree entered on May 1, 1941, was not changed but affirmed by all three justices on June 30, 1941.

3. It might be more forcefully argued that by Justice Healy's signing the order amending Justice Mathews' opinion that there was no dissent as to the amended opinion.

### Reply to Petitioner's Point 2.

Petitioner's second point does not point out any issue that had been previously adjudicated, and we submit the law of the case was not and is not now involved in the decision sought to be reviewed. The first appeal decided that the California court could settle the account of the receiver and determine the amount of the attorneys' fees. It did not attempt to settle the question of how they should be paid. The decision appealed from holds they should be paid in due course as administration expense, not by a sale of property of the estate under execution.

**Reply to Petitioner's Point 3.**

Petitioner's third point is a request that this court approve a custom and sanction conduct that is condemned by the canon of ethics and which this court has said in *Weil v. Neary,* 278 U. S. 160, 49 S. Ct. 144, 73 L. Ed. 243:

> "Many abuses have occurred in the bankruptcy practice and none is more frequent than that by which the attorney for petitioning creditors becomes counsel for the trustee subsequently appointed. This mingling of interests, frequently conflicting, is generally regarded by the court's as working to the detriment of one of the parties and to the undue advantage of another. Experience has shown the wisdom and necessity of separating the function and obligation of counsel by forbidding the employment in different interests of the same person. In this way only may the court be advised how conflicting interests are represented. Rule 5 was adopted as an obvious safeguard. The danger of giving entire freedom of selection of counsel to the trustees lies in the temptation of the attorney for some creditors when he becomes counsel for the trustees, to use his function as representative of all the creditors, unjustly to favor or oppose particular creditors or to induce the trustees to do so. Rule 5 leaves it to the court to waive the restriction if with knowledge of the particular circumstances it appears safe so to do, but if the court does not know of a proposed departure, it has no means of protecting creditors from the danger the rule is intended to avoid."

*In re H. L. Stratton, Inc.*, 51 Fed. (2d) 984, 18 A. B. R. (N. S.) 523, certiorari denied, 284 U. S. 682, the rule is stated:

> "We cannot too emphatically insist that the rules are to be strictly observed and that oral statements made to a judge are not lawful substitutes for the affidavits which are prescribed."

Again, in *Rogers-Pyatt Shellac Co.*, 51 Fed. (2d) 988, the court said:

> "One reason for that requirement is obviously to allow the court to consider the grounds advanced for selecting counsel presumptively disqualified by representation of the petitioning creditors, unaffected by the emotional pressure which inevitably arises in their favor after the services have been rendered. *Attorneys who seek appointment as counsel for an officer of the court owe the duty of complete disclosure of all facts bearing upon their eligibility for such appointment. If that duty is neglected, however innocently, surely they should stand no better than if it had been performed.* In the present case, had the facts been disclosed, the appellants would not have been appointed counsel for the receiver. If the rule is to have vitality and the evils against which it is aimed are to be eliminated, it should be enforced literally. Impliedly it forbids a *nunc pro tunc* order to validate for purposes of compensation an appointment which could not properly have been made had the required affidavit been filed." (Emphasis ours.)

See, also:

*In re Chicago Rapid Transit Co.* (8 C. C. A.), 9 Fed. (2d) 832.

Again in *G. W. Grannini, Inc.*, 90 Fed. (2d) 445, 111 A. L. R. 1492:

> "the court denied compensation to receiver's attorneys, even despite the disclosure of the fact that he was the attorney for a creditor. The court said: 'The rule is aimed at preventing not merely actual evils in particular cases, but the tendency to evil in all cases. It must not be frittered away by creating exceptions for hard cases."

General Order 44 was violated in procuring the appointment of two attorneys whose affidavits were false wherein they recited that they represented no interest adverse to the trustee or creditors, and the evidence was clear that five days before making the affidavits proceedings were started by them on behalf of Heiser to dismiss the proceedings in Oklahoma in which the trustee was acting. It is undisputed that during the time the attorneys were employed by the receiver they defended Heiser in his litigation against the trustee, who was representing all other creditors. Little doubt is left as to the reason why the opinion of Justice Mathews condemned their conduct.

**Reply to Petitioner's Point 4.**

There is nothing in the decision under attack that is in conflict with the new Chandler Act, or any of the decisions referred to by petitioners. The Circuit Court held that the lower court could fix the compensation of its officers and could direct their payment in the due and orderly course of administration, but none of the authorities cited by petitioner give an attorney or receiver the right to sell under execution the assets of a receivership or trusteeship in a bankruptcy proceeding in order to be paid ahead of

orderly liquidation. This the lower court attempted to do and was properly reversed. Such an order would result in a sale of assets of the estate in violation of Sec. 70-f of the Bankruptcy Act, which section requires notice to creditors, an appraisal of the assets and that the sale be for a sum not less than 75% of the appraisal.

*Remington,* 4th Ed., Vol. 5, Sec. 2213 states the rule:

> "Whilst the court of primary jurisdiction has exclusive power to administer the assets of the bankrupt estate, and it is the duty of the court exercising ancillary jurisdiction merely to collect and forward such assets to the court of primary jurisdiction, yet the ancillary court has the power to determine what are and what are not assets of the bankrupt's estate, and to that end adjudicate the interests of all persons making claims to or attempting to fasten liens on property within its possession. And, speaking in general terms, the trustee is entitled to the same remedies in the court of ancillary jurisdiction as in the court of original jurisdiction.
>
> *And the ancillary court may to that end also sell the assets, but in so doing, must give notices to creditors and otherwise conform with the various provisions of the bankruptcy act.*
>
> * * * * * * * * *
>
> Thus, while it is proper for the court in ancillary bankruptcy proceedings to determine adverse claims of ownership and liens upon property in its possession, and also, no doubt, the expenses of the receiver and trustee, in its preservation and care meanwhile, yet, questions pertaining strictly to the general administration of the bankrupt's estate, such as allowance of attorney's fees, expenses and compensation of re-

ceivers and trustees, questions of priority under Sec. 64(b) (5), 11 U. S. C. A. Sec. 104, whether assets should be abandoned, or left to the State Court for determination or for foreclosure of liens, are not to be heard in the court of the ancillary proceedings, but all such questions are to be addressed to the court of primary jurisdiction."

We submit that the law requires property of a bankrupt estate to be sold in the manner and as provided by section 70 Sub. f of the Bankruptcy Act and this provision is binding on a court exercising ancillary jurisdiction as well as primary.

The order authorizing a sale by the United States Marshal was erroneous and in excess of the jurisdiction of the District Court, and this portion of the order was stricken by the concurrence of all judges of the Circuit Court, and it did not disturb the decision previously rendered.

**Reply to Petitioner's Points 5 and 6.**

Points 5 and 6 concern the disturbing of the discretionary order of the trial court in the allowance of fees.

We submit that a reading of this record and the opinion of the three Circuit Justices leaves no doubt that the lower court abused its discretion in allowing the exhorbitant fees allowed in the case at bar.

The facts, as shown by the evidence concerning this allowance, may be classified as follows:

(1) Work performed before the signing of the order employing counsel, to wit, from July 13th to July 27th, 1939 [R. 21, 58, 72 and 73];

(2) Investigation of rumors and claims and records of pending suits and property standing in the name of Mrs. Woodruff. [R. 226, 246 to 249 inclusive, 260];

(3) Trip to Oklahoma [R. 265 to 268];

(4) Examination of witnesses under 21-A [R. 269, 272];

(5) Question of jurisdiction and respondent's brief on appeal in case No. 9401 [R. 276];

(6) Advice to receiver on operating the business [R. 234, 203 to 208];

(7) Bill of sale to Louis Fischl [R. 219].

POINT No. 1.

As to work done before the signing of the order employing counsel, the attorneys' petition for compensation and Mr. Turnbull's testimony shows that there was included in the petition for compensation the time spent from the 13th to the 27th of July. [R. 282.] We feel that under the authorities hereinafter cited the inclusion of time spent during this period is not a proper claim against this estate.

Rule 82 of the U. S. District Court for Southern District of California provides:

> "No Receiver or Trustee in Bankruptcy heretofore or hereafter appointed or elected in any Bankruptcy proceeding in this District, shall hereafter employ an attorney at the expense of the bankrupt estate, except on the order of the Court or Referee, based

> on a petition showing the reasons and necessity for the employment, and the name of the attorney it is proposed shall be employed. Attorneys employed in violation of this Rule shall receive no compensation."

This rule is taken from General Order No. 44. The order of employment was not by its terms made retroactive. [R. 21.]

POINT NO. 2.

Under the authorities it is clear that attorneys can only be paid for performing services in accordance with the order employing them, and that there is no obligation on the receiver's part nor can the attorneys be compensated where they spend their time in attempting to perform duties and services that have to do with the administration of the estate which should be performed by the receiver or trustee in bankruptcy. The Circuit Court for the Second Circuit has stated the rule in *In re Eureka Upholstering Co., Inc.*, 48 Fed. (2d) 95, 96:

> "In conclusion, we cannot ignore the curious notion which this application discloses, that an attorney may recover for what are not legal services at all. For example, in the petition at bar are items for arranging for the sale of the assets, hiring truckmen to carry back concealed property to the bankrupt's place of business, safeguarding the property, going along with the truck, checking up what was found, stirring up a criminal prosecution, getting hold of an accountant, collecting accounts due, inquiring of a pledgee of accounts as to any equity, examining the bankrupt's papers, and more of the sort. The implication behind these claims is that

> the receiver's attorney may recover, as for legal services, for discharging the duties of the receiver himself. This is an error due to the confusion that has come to pervade the whole relation of attorneys to the bankrupt estate, except for which it would seem scarcely necessary to say that the receiver or trustee, and he alone, can recover for services in collecting the estate, and that his statutory fees are the limit of his compensation for these. Any truly legal services he may require are indeed in another class, but his attorney, when he has one, cannot take on his duties, and then recover for them under the guise of legal services, which they are not. It is true that the line is not always easy to draw, but it is there, and referees should draw it straightly, else the estate will be burdened with a duplication of charges. Receivers may perhaps be too poorly paid to discharge their duties; if so, the system will not work. But no such consideration can disguise or justify an allowance to their attorneys for putting themselves in their place."

In this case the evidence shows that Mr. Turnbull learned that three of the Woodruff children were claimants against the estate and that he reported the fact to Mr. Lynch, who instructed him to ascertain the situation, which was followed by subpoenaing witnesses, including the Los Angeles Stock Exchange secretary and others. The receiver had no right to object to these claims and nothing is shown to have been accomplished by counsel's work in this connection, except to satisfy his own curiosity. [R. 270.]

As to the pending suits, no reason is shown why it was necessary for counsel to make a trip to San Diego and Orange County in order to search the records to see if

any suits had been filed, or were pending in said counties, where the evidence shows that none were discovered, and this could have been delegated to some clerk or other person for a nominal charge. [R. 249.]

In connection with the search of the records in Los Angeles County to ascertain what suits were pending, counsel's associate, Mr. Meyberg, had previously filed an affidavit in the case of *Heiser v. Woodruff*, showing all suits that had been filed against Mr. Woodruff for a number of years, their numbers and titles, and it was unnecessary for Mr. Turnbull to duplicate this work, nor is any reason given why this could not have been delegated to an office clerk. [R. 246 to 248.]

In respect to Mrs. Woodruff's property, the receiver had no right or authority to preserve or take over this property, and we feel that under the rule as stated in *Bailie v. Rossell, supra,* that any services rendered by counsel in this connection should not be compensated for from the assets of this estate.

## Point No. 3.

Counsel procured an order authorizing the estate to pay his expenses to Oklahoma to conduct an examination of Mr. Woodruff. The record shows that attorney Gibson had represented Mr. Meyberg and Mr. Turnbull in the proceedings in Oklahoma and no effort was made to have Mr. Gibson or the trustee conduct an examination in Oklahoma concerning the taking out of insurance on the properties in California. [R. 244.] The record further shows that when counsel arrived in Oklahoma he was unable to conduct an examination on behalf of the receiver, but that the examination that he conducted was in

respect to his motion there opposing the jurisdiction of the Oklahoma court. [R. 26, 224, 244.]

We submit that the estate received no benefit from the trip to Oklahoma and that the same was made with the object of counsel's attempting to cause a dismissal of the proceedings in Oklahoma, so that he could proceed as attorney for the petitioning creditors with the proceedings in California, this being another example of the danger of permitting the attorney for the petitioning creditors to represent the receiver, where he uses the receiver's position to assist him in his litigation. See *In re Eureka Upholstering Co., supra,* which is very similar to the case at bar.

POINT No. 4.

Counsel procured an order for the examination of witnesses under 21-A. The matter was continued from time to time by Referee McNabb, who heard all the testimony and made his charge as Master of $50.00. [R. 87.] A portion of the witnesses examined were in respect to claims, which have heretofore been discussed, and the examination of the other witnesses did not produce any benefit to this estate. [R. 271.]

POINT No. 5.

In respect to the question of jurisdiction, the orders, motions and brief in connection with this matter constitute a part of the record on appeal in case No. 9401. Attention is called to the fact that counsel merely had to file the respondent's brief and unsuccessfully opposed a motion to settle the record in respect to said appeal, and orally argued the matter before the Circuit Court. [R.

276.] Receiver's counsel asked for $5,000. for these services, which we submit is an excessive, unreasonable and arbitrary figure.

POINT No. 6.

As to advice to the receiver in respect to the business and the legal problems in connection therewith, as shown by the testimony of the receiver himself [R. 203 to 208], quoting from R. 205:

> "Q. By Mr. Cobb: Well, what problem did you submit to your counsel after you procured an order employing him? A. Well, the problem of a continuance of the business, the operation of the store, as to how the inventory should be taken, and what proceedings should be taken, if any, regarding other pieces of real property that had been suggested were assets of the bankrupt, several pieces of property in and about Los Angeles."

There is no problem shown, other than the question of jurisdiction, that required any advice from counsel, since Mr. Lynch was a professional and experienced receiver and he certainly did not need advice in respect to taking out insurance, filing certified copies and preparing an inventory, and matters of that nature, which are not legal matters, and counsel should not be paid. See *In re Eureka Upholstering Co., supra.*

POINT No. 7.

The District Judge increased the allowance to the attorneys by his minute order of June 21st, 1940, by $2,500., on the ground, as stated in the order, as follows [R. 120]:

> "* * * the Court has concluded that sufficient recognition was not given in the minute order made

June 20, 1940, to the element of preservation of the property of the Bankrupt against the Champion, Champion and Fischel assignment. Such factor has always been regarded as important in the fixing of fees. The minute order of yesterday is amended by providing for a total counsel fee of $7,500.00 instead of $5,000.00; and the receiver's fee is fixed at $2,000.00 instead of $1,750.00."

The record shows that this question was disposed of in a brief conference between Mr. Casey and Mr. Turnbull. Mr. Turnbull testified [R. 219]:

"A short time thereafter Mr. Fischl came to California with the bill of sale and Mr. Lynch conferred with me immediately about the matter. Thereupon I got in touch with Mr. Casey who was the attorney of record for Mr. Woodruff here. I don't know whether Mr. Casey told me first or I told him first that Section 3440 of the California Code would apply and that his transfer would not be good without possession, *but anyway we discussed it very briefly. Mr. Casey told me that he advised Mr. Fischl that he couldn't get the Stores, particularly, in face of 3440, and also because there was a receiver in charge.*"

The record further shows that the surrender of this bill of sale was obtained by the District Court in Oklahoma—Alleged Bankrupt's Exhibit No. 1. [R. 155 to 163.]

We submit the following authorities, which we think are applicable to the allowance made to the attorneys, which are:

Under the Bankruptcy Act, and General Order No. 44, it is necessary for the receiver to have an order

of court permitting the employment of counsel and the petition must set forth the matters for which counsel is to act, and the authorities are unanimous in holding that in the absence of an order, no compensation can be allowed to an attorney.

See

*Collier on Bankruptcy*, 14th Edition, Vol. 2, pp. 1671 and 1676;

*In re Realty Associates Securities Corporation*, 25 A. B. R. (N. S.) 275, 6 F. Supp. 549, 295 U. S. 295.

Nor may an attorney be compensated for services rendered which are not authorized in the order of employment.

*In re Rogers-Pyatt Schellac Co.*, 51 Fed. (2) 988.

The authorities are also in accord that a receiver has no right to try title to property held and claimed by others, and attorneys have been denied compensation for services rendered in such an attempt.

*In re Marcuse & Co.*, 11 Fed. (2d) 513, 515.

The rule governing allowances is discussed in Gilbert's *Collier on Bankruptcy*, 4th Edition, page 936 to 941, wherein the author states on page 941:

> "The amount of the allowance is not wholly a matter of discretion; it must be reasonably determined upon evidence of the services performed and of the value of such service; it rests in legal judgment and judicial discretion, but not in unrestrained discretion." Citing *In re Curtis* (7 C. C. A.) 4 A. B. R. 17, 100 Fed. 784; *Smith v. Cooper*

(5 C. C. A.) 9 A. B. R. 755, 120 Fed. 230. "The elements to be taken into consideration in making the allowance are:

(1) The time properly required to be spent on the controversy;

(2) The intricacy of the question involved;

(3) The amount involved;

(4) The strenuousness of the opposition encountered;

(5) The results achieved therein; as well as

(6) The policy of the Bankruptcy Act toward economy in administration."

This subject has been ably discussed in *Bailie v. Rossell, supra:*

"This appeal concerns the allowance of fees to a receiver in an amicable receivership. Where a court is called upon to administer the affairs of a financially embarassed corporation and is itself unable to oversee the management of its business and conserve its property, it is customary and proper for such court to call to its aid in administration persons or corporations who become the quasi officers, or, so to speak, the right hand of the court. To look on receivers and receiverships in any other light is to lose sight of their real status, for, as said in Penner v. Drilling Development Co. (D. C.) 293 F. 766, 767, 'It must be remembered, though too often forgotten, that receiverships are not to enrich the incumbents and counsel.' The law placing on the court the duty of conserving, operating, or liquidating the property of an unfortunate corporation, and this duty of the court being intrusted to the court's officer, the fixation of such receiver's compensation

resolves itself into the inquiry what was the duty, labor, responsibility, imposed on the court which it performed by the hands of its assisting receivers. This general principle is recognized by federal courts, when called on to give the sanction of their approval to allowances made in receiverships which in the final analysis are paid by creditors. In that respect the Supreme Court of the United States, *speaking by the late Chief Justice Taft, said:* 'We are desirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance.' In re Gilbert, 276 U. S. 294, 48 S. Ct. 309, 310, 72 L. Ed. 580. This warning of the Supreme Court against 'vicarious generosity' has also been sounded by other federal courts.

In Trustees Corp. v. Kansas City, M. & O. Ry. Co., 26 F. (2d) 876, 882, Judge Kenyon of the Eighth Circuit, said: 'I agree with the statement in the opinion that "the receiver and his counsel are entitled to be well paid for the services they rendered."' While the receiver and his counsel are entitled to be well paid, there is no reason why they should be overpaid. It seems to me there has been a growing tendency in the courts to allow fees to receivers and their counsel far beyond the standards of compensation for similar services where no receivership existed. *There is no particular divinity surrounding a receivership and no magic in the appellation 'receiver' that changes ordinary and usual services into something of exaggerated value."* * * *

"In view of the direction of the Supreme Court already quoted, that 'judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vivarious generosity in such

a matter could receive no countenance,' the proofs have had our most serious consideration, with the result that we find no proof of services or responsibility on the part of the Delaware receivers as would warrant this court in allowing anything beyond the sum of $2,500, which the court will allow Mr. Rossell in a modified decree, which the court below will enter."

See, also *In re Curtis,* 100 Fed. 784 at p. 794:

"We have stated that the estate available for the payment of partnership debts at a liberal estimate is $101,699.48. The creditors are but at the threshhold of the administration of the estate. That administration will involve much labor and expense. If the allowance of $12,500 for merely opening the door to the administration of this estate is, within the spirit of the bankrupt act, the minimum of cost for that service, and the service of the trustees and their counsel in the difficult work which lies before them is to be compensated in the same spirit and by like standard, we may well indulge the fear that at its close this case will have its counterpart in the tragic and untoward ending of the noted case of Jarndyce v. Jarndyce. We are not inclined to impose upon the Seventh judicial circuit the baneful influence of that authority.

We have searched this record with care, that we might arrive at just judgment with regard to the amount that should be allowed for the service rendered. We have been solicitous to award full, reasonable compensation, but careful to withhold inordinate allowance. We reach the conclusion that an allowance of $2,000 fully compensates the service. We have doubted if this be not too large a sum. We are not unmindful of the dignity of the profession, nor

forgetful of the important duty of counsel. We would not underrate that duty. We would magnify his office. For exacting labor done, weighty responsibilities assumed, and great results accomplished, we would deal out compensation with liberal hand. We think, however, that the dignity and honor of the profession are not conserved, or its influence for good promoted, by excessive allowance for service. That would lend countenance to the suggestion sometimes heard that the commercial spirit of the age has invaded even the legal profession, to the impairment of its dignity, the blunting of its sense of honor; that a profession instituted for the maintenance of justice has become degenerate, and that its main calling now is a vulgar scramble for the 'almighty dollar'. We cannot bend our judgment to lend sanction to a foul aspersion.

The order is reversed, and the case is remanded, with directions to the court below to proceed in the matter in conformity with this opinion."

**Reply to Petitioner's Point 7.**

Petitioner's Point 7 has been answered under respondent's reply to Point 3. We do, however, desire to point out an error occurring in Justice Healy's opinion quoted by petitioners wherein he recites:

"It seems to me hardly just to question the statement of the trial court that the facts were disclosed to it; and I believe it to be wholly unfair to the attorneys to assume that there was any concealment on their part or any real failure to disclose their connection with Heiser. The record is replete with evidence of disclosure."

We have called attention to the fact that the trial court judge who made the findings was not the judge who signed the order authorizing the employment of counsel. Later disclosure to other judges would not affect the irregular manner in which the appointment was procured. Further the opinion overlooks the prior action by Heiser and his attorneys in trying to dismiss the proceedings in Oklahoma, which was not disclosed to the court below or in the affidavits and petition which was in violation of General Order 44.

## Conclusion.

We submit that no ground is shown justifying this court's assuming jurisdiction, and that the decree of the Circuit Court for the Ninth Circuit is not in conflict with any decision of this court, or any Circuit Court. That the decision sought to be reviewed is proper and was regularly rendered.

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